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## Closing Disasters and How to Avoid Them



### What Just Happened?

Well, things seem to be going well at the closing table, and then all of a sudden, you see the blood drain out of your attorney's face and he or she seems very preoccupied at the moment. Assuming no health catastrophe is unfolding before your eyes, what has just occurred is the discovery of a "problem" that your attorney may or may not be able to solve in order to get the transaction to completion. Things can happen, and many times, problems can be avoided by pre-closing attentiveness to detail by all concerned. Here are a few of the standard "problems" and how things get solved.

### Check the Check

At a recent closing, everything had gone smoothly and the closing had been completed in just over an hour (that's pretty fast). The purchaser did not attend the closing but had given his attorney a power of attorney so that his attorney could act as the purchaser's "attorney-in-fact". The bulk of the purchase price had been paid with a certified check drawn on the account of the purchaser's attorney and issued by one of the major banks in New York City. Shortly after the closing, the seller contacted his attorney about an anomaly on the check. The amount of the check both in numbers and words was correct, but the certification amount stamped on the check by the bank was \$10,000 less than the amount of the check. A call to the bank disclosed that if the check was deposited, the seller would only get credited for the amount certified by the bank, not for the amount actually written by the purchaser. What to do? The seller's attorney immediately contacted the purchaser's attorney who agreed that the check had not been prepared correctly by the bank of the purchaser's attorney. The purchaser's attorney called his bank and arrangements were

made to have the incorrect check returned to the bank by messenger and a corrected check delivered to the seller. Had the mistake not been noticed, it could have taken weeks to discover why the seller was credited with \$10,000 less than the amount of the check.

### **Nature Boy**

In a recent deal, the purchasers had indicated to the seller when the contract was being negotiated, that the closing had to take place by the end of the following month, as the purchasers had notified their landlord that they would be leaving in 60 days (as required by the lease). The contract stated a closing date 60 days ahead, but did not state the closing to be "time is of the essence", nor did the contract specify a penalty for a late closing. Penalties for late closings in residential deals aren't provided for very often because closing dates are usually stated to be "on or about" dates. About a week before the closing, the seller's attorney called the purchasers' attorney and wanted to know if the closing could be scheduled three weeks after the stated closing date. As mentioned, the purchasers' lease was to expire in a few days and purchasers were counting on closing on the scheduled date. The purchasers' attorney asked the seller's attorney to contact the seller to arrange for a closing on the scheduled date. The purchasers' attorney was informed that the seller was a fan of the great outdoors, was "in the Midwest somewhere" and couldn't be contacted for several days. What to do? Fortunately, the purchasers were able to extend their existing lease for another month and the closing took place almost thirty days after the originally agreed upon closing date (in most cases, either party can delay a closing for thirty days without breaching the contract). To give the purchasers comfort, a daily penalty was agreed to by seller if the seller failed to close on the rescheduled date. The seller made it back from the wilderness and the transaction closed. What if the purchasers were obligated to move out as agreed to with their landlord? Could the purchasers charge back the cost of interim accommodations and storage? Unless specifically provided in the contract, the answer would be no. Is that type of protection usually provided in the contract? No. Although unexpected delays do occur with some regularity, closings almost always take place within two weeks of the scheduled closing date.

### **Money Conquers Hate**

Sometimes the purchaser and seller, for many reasons, legitimately hate each other. Such a lovefest took place several years ago involving a triplex apartment in a brownstone located on the upper east side of Manhattan with a seven-figure selling price. The purchaser had been renting the apartment from seller at a fairly pricey rent for a number of years. Disputes had arisen over the years about certain repairs that the purchaser claimed the seller should have made, but had been made and paid for

by purchaser. For reasons known only to purchaser, he chose not to reveal his desire to have such costs reimbursed (about \$7,000 worth), until two hours into what would become a seven-hour closing. The seller said no, left the closing room and the purchaser's attorney threw his pen at the seller's attorney. What to do? The seller's attorney spoke with the seller, the purchaser and the purchaser's attorney. Entrenched positions, no progress. The closing had started at 3 p.m. and it was now close to 7 p.m. As is usually the case, after much cajoling, begging and pleading, the parties agreed to split the cost and complete the transaction. Fortunately, the closing had been scheduled for late in the day at the offices of the attorneys for the purchaser's bank. Since it was a small coop (only two units), there was no managing agent involved. The bank's attorney was willing to let the parties fight it out and agreed to stick around. Had the closing taken place at the office of a managing agent, the closing would have been adjourned as managing agents stop being cooperative once the two-hour mark has been surpassed. The parties would have been kicked out after 2 hours and the closing might not ever have happened. As is always the case, if the payment of a small sum of money can make a problem go away at the closing table, pay the money and move on.

### **Show Me the Money**

Banks don't like to lend money as much as they used to. When they do agree to make a residential loan, they wait until the last possible moment to fund the loan. In many cases, the bank does not fund the loan until the morning of the closing. Sometimes the wire transfer gets lost or takes longer than expected. At a recent closing that began at 2 p.m., the parties finished their paperwork with the coop and with each other by 2:30. At 3:15, the office of the bank's attorney was called as no one had arrived from the attorney's office. When the attorney finally showed up at 4:30, he announced that the wire of funds had not yet been received by the bank. The managing agent demanded that the closing be adjourned. The parties begged the indulgence of the managing agent so that the closing could be completed. The person handling the closing for the managing agent reluctantly agreed. 5:30, still no money. At 6:00, the bank's attorney announced that the wire had been sent and that someone would hand deliver the official bank checks as soon as the wire was received. The managing agent's representative, for lack of a better word, was hysterical. The yelling and screaming commenced. At 7:00 pm, the checks finally arrived and the closing was completed. Something that should have taken 2 hours, turned into a 5 and half hour drama. If there is a way to complete the transaction, keep the parties in the room and make it happen.

### **The Inexperienced Attorney**

At a closing of a cooperative apartment, a substitute lawyer showed up for the

seller's attorney who was unavailable because of a schedule conflict. The seller's attorney asked to speak with the purchaser's attorney outside of the closing room. An "outside the closing room conversation" is generally an indication that something has come up and will have to be worked out. The seller's attorney informed the purchaser's attorney, that he was, in fact, a criminal attorney, had never attended a real estate closing before and was just doing his friend a favor. What to do? The purchaser's attorney agreed to call the plays for the substitute counsel who had at least shown up with the necessary paperwork. Not fair, but it worked.

### **Check the Check--Part II**

At a closing for a cooperative apartment with a purchase price over a \$1,000,000, the purchaser was obligated to pay a one percent "*flip tax*" in connection with the purchase of the apartment. In some buildings, the Board passes along this transfer fee to the purchaser rather than the seller who usually pays the flip tax. Prior to the closing, the seller's attorney checked with the purchaser's attorney to make sure that the purchaser would bring an official bank check for the flip tax as well as a official bank check for the "*mansion tax*", as the price was over a million dollars. In New York State, if the price of a home is \$1,000,000 or more, the purchaser has to pay a transfer tax to New York State equal to one percent of the purchase price. As it turned out, the seller's attorney knew the purchaser's attorney from a number of other closings. Everything was going fine at the closing until it came time for the purchaser to present the checks for the flip tax and mansion tax. The payment of the mansion tax had not been mentioned to the purchaser. Silence at the closing table. Without the payment of the mansion tax, the closing could not be completed. What to do? The purchaser's attorney accepted a personal check from the purchaser (which check would not have been accepted by New York State) for the amount of the mansion tax (a little risky for the purchaser's attorney but it had to be done) and agreed to give the seller's attorney an "*attorney's escrow check*" for the payment of the tax, which check would be acceptable to New York State. The purchaser's attorney then agreed to go to the bank immediately after the closing and certify the attorney's check (which really wasn't necessary, but was appreciated). If the attorneys had not known each other, the dance over the check might not have gone as smoothly. Once the parties are at the closing table, the attorneys do try to work things out almost all of the time.

### **Spelling Counts**

The parties were done with the closing documents and the purchaser's attorney produced the official bank checks that the seller's attorney had requested. The numbers were perfect, but there was one small problem, the pay-off check for the seller's mortgage had the wrong bank as payee. That's not good. Fortunately, the

purchaser's bank was close by and the purchaser left the closing to get the check replaced. A one hour delay, but the closing was completed.

### **I've Got the Power**

Many times one or both parties have their attorney represent them at the closing by power of attorney. Those powers are usually approved in advance by all parties who will have to rely such powers, such as the managing agent, title company and the seller and purchaser, as the case may be. When someone shows up at a closing with a last minute power, problems can occur. At one closing, the attorney showed up with a power that had been signed by the purchaser, but had not been notarized. The purchaser was in California, so there was no way to for a corrected power to arrive at the closing. Fortunately, it was a condominium transaction and the title company agreed to take a faxed copy of the properly completed power, with an "undertaking" from the purchaser's attorney to overnight the original power the next day. The seller didn't care how the purchaser worked things out, as long as the transaction closed and the checks were delivered, which they were.

### **Show Me the Money—Part II**

Buyers usually wire funds to a checking account from a brokerage account a day or so before the closing, in order to have sufficient funds to close. In a recent situation, a foreign buyer, who was an "all cash" buyer, was getting his funds from a bank account somewhere in Europe. The buyer insisted on a specific closing date and the seller accommodated the buyer's wishes. The day before the closing, the buyer announced that the funds had not arrived. The usual panic ensued from the seller's attorney. The deposit funds had showed up late and now the closing funds were missing. Would the closing ever happen? Was the buyer real? The inevitable questions started getting asked without any satisfactory answers. The closing was adjourned for two weeks. The day before the re-scheduled closing, the buyer's attorney had not received the funds. Apparently, the wire had been bounced back to the buyer's bank in Europe for reasons unknown. Anxious calls from the seller's attorney, with the threat level increasing. Finally, a week later the funds did indeed arrive and all was forgiven at the closing table (as it usually is). Had there been a problem with the underwriting of the buyer's loan (where a portion of the closing funds were coming from the buyer's bank), the ending could have been quite different. Sellers have no choice, but to wait for the the buyer to complete his or her obligations with the bank, so that the loan will be released for closing. If a bank withdraws it's funding, because of a material change in circumstances, a transaction that was on its way to the closing table, can come to a complete halt. In today's world, banks can and do withdraw underwriting. Fortunately, a bank exiting a transaction does not happen with any frequency.

## **Residential Reality: Close, If You Can**

Once the parties get to the closing table, the attorneys will do what they can to get the transaction closed, no matter what comes up at closing. Some problems are insurmountable and the closing will have to be adjourned. In most cases, a solution will be found and the parties will wait it out until the accommodation is made, the undertaking is given, the fax is received or the required E-mail shows up. Wear comfortable clothing, it could take awhile.

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